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Nos. 435, 436, 437

In the Supreme Court of the United States

OCTOBER TERM, 1958

HARRY LEW, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND WOOL, PETITIONER

v.

UNITED STATES OF AMERICA

MARVIN RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 435, p. 31; Pet. 436, p. 28; Pet. 437, p. 21), is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1958. On September 9, 1958, Mr. Justice Harlan extended the time for filing petitions for a writ of certiorari to and including October 10, 1958 and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was fatal variance where the indictment charged one conspiracy, the proof showed that there might have been two conspiracies in which all but one of the petitioners participated, and the court charged that there were two conspiracies.

2. Whether there was sufficient evidence to show the participation of petitioner Wool in the conspiracies.

3. Whether the court below properly found, by an *in camera* examination of a government report, that any error of the trial court in denying its production at trial was harmless error because the report was not a statement subject to discovery under 18 U. S. C. 3500.

STATUTE INVOLVED

18 U. S. C., Supp. V, 3500 provides:

> SECTION 3500. *Demands for production of statements and reports of witnesses.*—(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than th defendant) to an agent of the Government shall be the subject of sub-

pena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose

of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

Count 1 of a three-count indictment, returned in the United States District Court for the Southern District of New York, charged petitioners and six

others with a conspiracy in violation of 18 U. S. C. 371, to defraud the United States with respect to the administration and procurement of government contracts. Counts 2 and 3 charged petitioner Rubin with bribery in connection with the contracts in violation of 18 U. S. C. 201 (Pet. 436, pp. 36–41). After a jury trial petitioners and two co-defendants, Ades and Hort, were convicted under the conspiracy count.[1] Petitioner Rubin was acquitted as to bribery under the second count but convicted under the third (R. 4178–4179).

Petitioner Lev was sentenced to serve nine months imprisonment and to pay a fine of $5,000; petitioner Wool to eighteen months and a fine of $1,500; and petitioner Rubin to fifteen months each on the first and third counts, to run concurrently, and a $1,000 fine on the first count (R. 4262–4265). On an appeal by petitioners and co-defendant Ades, the convictions were affirmed (Pet. 435, p. 31; Pet. 436, p. 28; Pet. 437, p. 21).

A. THE EVIDENCE

1. *The cap contract.* In 1952, petitioner Rubin was working for a firm for which he had obtained several Navy contracts in return for 33-1/3 per cent of the company profits (R. 410, 1913). In the early part of the year he was contacted by the officers of Bonita Originals, Inc., a New York firm manufacturing dresses in Puerto Rico, which had suffered business losses and was interested in obtaining gov-

[1] One co-defendant entered a plea of guilty and testified as a prosecution witness; one was acquitted. A motion to sever was granted as to two others.

ernment contracts (R. 300, 373, 3089, 3094–3095). He had many meetings with the officers—Ades, the president (and a co-defendant in the action), Levy, the secretary-treasurer, and Carlin, an accountant who had initially suggested that Rubin could get the government contracts they needed (R. 314, 406–407, 3095). Rubin told the officers that he would get all the Army contracts they could handle in return for 50 percent of the profits accruing from the work (R. 307, 315, 408, 3097). He said that 5 to 7 per cent of the face value of the contracts would be needed for gifts and entertainment for government personnel in order to get the contracts and to avoid any difficulties with the government in their performance (R. 312–313, 412). He spoke specifically of his contacts at the New Quartermaster Procurement Agency (NYQMPA), which during the period here described (specifically in October, 1952) became known as the Armed Services Textile and Apparel Procurement Agency (ASTAPA) and which until its demise in October, 1953, handled procurement for all the armed forces (R. 176, 307). Rubin mentioned the names of "Major Farnell", a contracting officer and "Mella Hort" a clerk in the contract administration branch of the agency (R. 314).

The Bonita officers accepted Rubin's proposal when he agreed to take 33-1/3 per cent, instead of 50 per cent, of the profits (R. 309, 3100). After Rubin brought them samples of various Army garments, they decided that the company would bid through the NYQMPA on three contracts for the Army garrison cap because it was a relatively simple item to man-

ufacture in the company plant at Puerto Rico (R. 414, 415). Rubin assured the others several times "We will get it. Don't worry about it" (R. 416, 420). Rubin was to handle the bidding exclusively (R. 416–417, 3197).

In June, 1952, Bonita was awarded all or part of the three different contracts for the manufacture of over one million garrison caps (R. 417, 3198). The award to Bonita of two of the three contracts had been recommended by NYQMPA contracting officer, Major Eric Farnell, who had supervisory authority over the issuance, review and evaluation of bids, the making of awards and the administration of contracts (R. 157, 163–164, 179–180). The clerk, working under the contracting officer's supervision and having charge of the administration of the three contracts, was Mella Hort (R. 165–166, 190).

After the award of the contracts the company president, Ades, took over the management of the plant in Puerto Rico where the caps were to be made. Levy, the secretary-treasurer, remained in New York with Rubin, who was to be in complete charge of liaison with the procurement agency (R. 357, 416, 358–359, 420, 1074, 3197). Almost immediately, Rubin requested money from Levy, to reward the government personnel who had aided him in securing the contracts (R. 318, 422–423). Rubin suggested that Levy record the payments in Arabic and that he charge the sums to travel and entertainment on the company's books (R. 433). He told Levy that an initial sum of $1,000 which had been turned over to him had been paid to

Major Farnell (R. 433). In Levy's presence, he gave a $500 payment to an NYQMPA accountant, Pollack, who had likewise recommended the awards (R. 157, 165, 426–427, 431). In September 1952, Rubin gave $100 to Mella Hort, which was entered on company books as a $99.70 charge to travel and entertainment (R. 439–440). At this time Hort prepared a document authorizing the government's acceptance of 37,000 defective hats manufactured by the company at a reduction of one cent per hat (Govt. Ex. 8–D; R. 111). Thereafter, numerous payments of sums of money, one as high as $1,500, were made to Major Farnell, Mella Hort, Pollack and other procurement agency employees (R. 496, 499, 521–530, 538).

In November, petitioner Wool and Mella Hort, at Rubin's request, changed the delivery schedules to give Bonita more time to complete its contracts without penalty (Govt. Ex. 3–B; R. 106). In February, 1953, petitioner Wool, Mella Hort and Major Farnell prepared the authorization accepting some 2,000 defective Bonita-made caps at one cent per hat reduction in price (Govt. Ex. 6–B; R. 109). Petitioner Wool, an Air Force captain, came to work at the agency in September 1952, succeeding Major Farnell as the contracting officer on the Bonita contracts (R. 89). In December 1952, Bonita's secretary-treasurer, Levy, recorded in his Arabic notes that Captain Wool had been given $200 upon Rubin's request because Wool was going to help them in the future (R. 504).

In addition to outright payments of money, Rubin, with company funds, plied procurement agency employees with gifts during this period. A deep freeze,

large quantities of meat, and lingerie went to Porreca, an agency chief inspector who controlled the assignment of all inspectors (R. 510–511, 513, 1205, 1227–1228). Porreca, at Rubin's request, transferred elsewhere a subordinate assigned to the company's Puerto Rican plant whom Ades had found difficult and replaced him with a new plant inspector whom Rubin had suggested (R. 444–445, 1213–1226). The new plant inspector, who was living "like a king," rent free in Ades' house during his three months' inspection duty, "cooperated" fully, even to the point of sending defective caps to Rubin instead of to his superiors (R. 1224, 1351–1356).

Rubin, in New York, purchased clothing for Mella Hort and for her children (R. 466–470). Both she and, later, petitioner Wool visited the Bonita offices frequently. On one occasion, Wool picked up an overcoat for himself and another time children's garments which Ades had sent from Puerto Rico (R. 471, 550–552).

In June, 1953, Bonita paid Wool's medical bills amounting to some $265 (R. 543–545, 1145). On Rubin's instructions, the Bonita secretary omitted the designation "Dr." before the doctor's name on the check and charged the amount on the company books to professional fees (R. 546, 1087). Rubin told Levy that Captain Wool had been visiting him (Rubin) when he became ill, that he had gotten his own family doctor to take care of Wool and that Bonita should pay the bill because it needed more work and Wool was trying to get a contract for them which another firm was performing (R. 543–544).

At about this time, Wool and Hort visited this other firm threatening it with cancellation of its government contract unless it met its delivery schedules on garrison caps or subcontracted to another company (R. 3587–3588). The firm was forced to subcontract. Bonita got the subcontract (R. 167–168). Mrs. Hort told Levy that she and Wool had "worked hard" to get the subcontract for Bonita (R. 570–571).

In the summer of 1953, Bonita received its final payment on the garrison cap contract after having sent to Puerto Rico, at company expense and compensation, a government property specialist who discovered and ironed out discrepancies in inventory (R. 1165–1166, 1170–1171).

2. *The white hat contract.* In December, 1952, and again in April, 1953, while Bonita was fulfilling its cap contracts, the procurement agency received requests for the purchase of nearly 7 million enlisted men's white sailor hats, and 7 thousand midshipmen's white hats (R. 168). An invitation to bid was issued on April 23, 1953 (R. 169). Petitioner Wool was assigned as the contracting officer (R. 165–166).

Petitioner Rubin learned of the government purchase authorizations, despite their classified nature, long before the invitation to bid was issued (R. 571–572, 2059). He discussed with Levy the possibility of Bonita submitting a bid but Levy refused because he felt that Bonita was not equipped to handle such work (R. 576, 578).

In early April, some three weeks before the invitation to bid had been issued, petitioner Lev, the owner of the Mid-City Uniform Cap Company in Chicago,

(R. 580) met with Rubin in the home of Mella Hort. They discussed the possibility of bidding on the white hat contract (R. 1523–1524). Rubin described to Lev the advantages of manufacturing in Puerto Rico (R. 2077–2078).

Several days later, Rubin and Lev met in an automobile a short distance from ASTAPA headquarters. Lev signed a check for $2,000 made payable to Mrs. Hort's husband (R. 1511–1512, 3412–3414). Although the defense later claimed that this check was given as an advance on an unmaterialized resin enterprise (R. 1520, 3415), Rubin told Levy that Lev had given the check, as well as clothing from Saks Fifth Avenue and cash of $400 or $500, to Mella Hort in connection with the white hat contract. Levy recorded this in his Arabic notes (R. 617–620, 663).

After further meetings between Lev and Rubin in Chicago and in New York, it was decided that they would bid on the white hat procurement (R. 2083, 2087, 2092–2094). Lev was to receive 51% of the profits; Rubin and Ades (who flew in from Puerto Rico to attend the New York meeting of Lev and Rubin) were to share the remaining 49% (R. 594; Govt. Ex. 67, R. 2100). Rubin told Levy that he and Ades would bring their profits into Bonita (R. 592, 597). He also told Levy that Wool and Hort were assisting them in getting this contract (R. 606).

Ades immediately began negotiations with Puerto Rican authorities for an option on some newly-constructed government-owned factory buildings (R. 1550–1551). He told the authorities that Lev, his new partner, was in the process of receiving an award

from the United States Government for the manufacture of Navy hats—this even before Lev had submitted a bid. Negotiations for the option were completed on May 1, 1953.

Four days later, on May 5, 1953, the bid was submitted on the entire quantity on an all-or-nothing basis (R. 169, 2097). This was the last day for the submission of bids and this was the lowest bid (R. 2096).

ASTAPA ordered a pre-award survey to be made of Lev facilities in Puerto Rico to determine whether they were sufficient (R. 1242). Rubin asked Chief Inspector Porreca to expedite the survey (R. 1242). Although the survey report revealed that Lev and the others had absolutely no machinery in the plants and no personnel on hand, it concluded that the facilities were adequate (Gov't. Exs. 14–F, 14–H; R. 123). Porreca, reviewing this report, told Rubin there might be certain difficulties because of the lack of machinery (R. 1244). Rubin assured him that there would be no difficulties because Raymond Wool was assisting them, stating, "Ray is one of the boys. What are you worried about?" (R. 1244–1245).

On May 20, 1953, on petitioner Wool's recommendation, the entire contract was awarded to Lev (R. 170).

Shortly thereafter, Wool called the Bonita office and spoke to Rubin (R. 607–8). Rubin told Levy at this time that Wool was upset because he had received only $1,000 from Lev and that he was supposed to receive $5,000 (R. 608–609). Rubin then called Lev and told him that Wool was complaining

(R. 609). Lev withdrew $8,000 from his Chicago bank (R. 1416) and came to New York on June 29, 1953 (R. 1193–1194). He met Rubin, Wool and Mrs. Wool at a restaurant where he handed Mrs. Wool $5,000 in cash (R. 610–612). Shortly thereafter the Wools made a $5,900 cash payment on a home (R. 1419–1420).[2]

During that month, Lev requested permission to have government-furnished material to be used in his manufacturing process shipped in domestic packaging rather than the export packaging which his contract called for (R. 171). Wool granted such permission, making it possible for Lev to save $41,000. Wool also granted permission for Lev to ship the finished hats back to this country in less expensive packages, saving Lev some $21,000 (Gov't. Exs. 16–A, 16–K; R. 79, 138, 171, 1705–1716). Porreca, who had been given $1,000 by Lev, had another (see p. 9 *supra*) "difficult" inspector reassigned at Rubin's request (R. 1253–1254). Lev was delinquent in meeting delivery dates and a substantial number of the hats were defective (R. 1573–1578, 1645–1646, 1618–1650, 1811–1819).

B. THE CHARGE

After the trial court, in its instructions to the jury, set out certain general principles as to the law of conspiracy (R. 4035–4039) it discussed the government's

[2] The government showed that Wool, in a Senate hearing, explained his personal finances during this period by stating that he had borrowed $9,000 from one Luciano, giving him a note for $5,000 (R. 1483–1486). Luciano denied having lent this amount or having received such a note (R. 1489–1490).

evidence as to "one such agreement" (R. 4040), the evidence relating to existence of the Bonita conspiracy. Thereupon the court stated (R. 4042):

> Before we discuss the defendants' position, you will note that I did not refer to any matter involving the defendant Lev in discussing the evidence as to whether or not there was a so-called Bonita conspiracy. This was deliberate. It is important that you keep Bonita matters distinct from the white hat matters. I will discuss this more fully subsequently. Since the defendant Lev was not involved in the Bonita transactions, you must determine whether or not there was a so-called white hat conspiracy before you may convict him and you must disregard as far as Lev is concerned any evidence concerning the Bonita transaction.

The court next discussed evidence as to the existence of the "white hat" conspiracy (R. 4042–4049), concluding (R. 4049–4050):

> If you find beyond a reasonable doubt that the alleged conspiracies existed, you then come to the next essential element that the Government must also prove beyond a reasonable doubt. * * *
>
> Before you may convict any defendant it must be shown beyond a reasonable doubt that the particular defendant was a member of the alleged conspiracy.

The court explained, and used an illustration to show, under what circumstances declarations and acts of co-conspirators might be admissible, if at all, against a defendant (R. 4050–4053). Stressing the fact that the government must satisfy the burden of

showing individual membership in a conspiracy, with knowledge and intent, the court discussed the defendants separately, saying *inter alia* (R. 4053–4054):

> As to the defendant Lev, I have already instructed you, and I repeat, you must not consider any of the Bonita transactions, that is, Bonita testimony or exhibits in determining the guilt or innocence of the defendant Lev. As to him, you must only consider whether there was a so-called white hat conspiracy to defraud the United States in the exercise of its governmental function of administration and procurement of government contracts, and whether the defendant Lev was a member of such a conspiracy.
>
> In determining whether or not Lev was a member, you must consider only the independent evidence against him. In view of the length of the trial and in order to avoid any possibility of confusion on your part, I will endeavor to refresh your recollection as to some of the independent evidence. I am sure that it is unnecessary for me to repeat this again, but I shall.

The court thereupon reviewed the independent evidence as to each of the defendants, stating the positions of each (R. 4054, *et seq.*).

After a recess, the court briefly reviewed the law which it had covered, reminding the jury again *inter alia* (R. 4085):

> If you are convinced that there was such a conspiracy involving Bonita but not white hat, or if there was a white hat conspiracy that Lev

> was not in it, then you must acquit the defendant Lev because he was not involved in the Bonita transactions.

After the jury had been out some time it asked (R. 4167):

> If a conspiracy existed on the Bonita contract and was not terminated by some act of the conspirators, does it then follow that:
>
> (a) The conspiracy continued during the course of the white hat contract.
>
> (b) There had to be a conspiracy on the white hat contract.

The reply was in part (R. 4167–4169):

> If you find that certain defendants were engaged in a conspiracy to defraud the Government during the period of the Bonita transactions, you may find that as to certain of these defendants there was a continuing unlawful scheme which continued on into the white hat transaction.
>
> * * * * *
>
> However, you will recall that I instructed you that with respect to the defendant Lev, that he was not a member of the alleged Bonita conspiracy, therefore, even if you find that there was a Bonita conspiracy, you may not convict Lev unless and until you find that there was a so-called white hat conspiracy to defraud the United States and that Lev was a member of such a conspiracy.

In affirming the convictions, the court below held that Wool's participation both in the Bonita transaction and the white hat transaction made the conspiracy a single one as to him, and that any variance as to Lev, who participated only in the white hat

transaction, was harmless error in that his rights were scrupulously protected by the trial court.

ARGUMENT

1. As appears from the Statement, *supra*, the evidence showed that the conspiracy which started with Bonita's cap contract was continued into the subsequent white hat contract, with one person (Pollack) withdrawing, and another, petitioner Lev, entering at the second stage. As to those involved in both phases of the conspiracy, including petitioner Wool, who raises a claim of variance here (Pet. 436, pp. 13–17), the conspiracy was, as the court below noted, one over-all conspiracy to defraud the government in the faithful execution of government contracts. It is true that Wool did not enter the picture until the later stages of the Bonita cap contract when he was assigned to duty in that area, but the evidence showed, and the jury was justified in concluding, that he entered in and adopted the conspiracy as it existed at that stage of the cap contract, and continued with it in its white hat phase. He thus joined the over-all conspiracy which embraced both contracts, and is in no position to claim any variance at all, much less a prejudicial variance. *Canella* v. *United States*, 157 F. 2d 470 (C. A. 9); *Quirk* v. *United States*, 161 F. 2d 138 (C. A. 8); *Monroe* v. *United States*, 234 F. 2d 49 (C. A. D. C.). See *Blumenthal* v. *United States*, 332 U. S. 539, 556–557, where this Court, after noting that conspiracies often "mature by successive stages which are necessary to bring in the essential parties", pointed out that "the law rightly gives room for allowing the

conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others."

Since, therefore, the core of the conspiracy was single, the claim by petitioner Lev of "mass trials of separate conspiracies" (Pet. 435, p. 12) is wholly unfounded. (See the Statement, *supra.*)

The situation here bears no relation to *Kotteakos* v. *United States,* 328 U. S. 750, where, although eight or more different conspiracies by separate groups of defendants having no connection with each other were proved, the trial judge instructed the jury that only one conspiracy was charged and that the acts and declarations of one conspirator bound all. In contrast to this case, in *Kotteakos* the distinct and disconnected agreements had neither a direction toward a single unlawful end nor common participants except for one central figure not on trial. Moreover, even treating the two aspects here as separate conspiracies, the "sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation", *Kotteakos, supra,* at 766, distinguishing *Berger* v. *United States,* 295 U. S. 78, where a variance was held immaterial under a factual situation more closely akin to the present. In the instant case at most only two conspiracies were proved as compared to over eight in *Kotteakos.* In *Kotteakos* thirty-two defendants were indicted and nineteen brought to trial as compared with nine defendants here indicted with six brought to trial. The

jury in *Kotteakos* considered the case against thirteen defendants; here it considered the case against six, four of whom were involved in both phases.

As to petitioner Lev, who was involved only in the later, separable, phase relating to the white hat contract, it may be that the two phases were separate conspiracies insofar as he is concerned. Whether the phases had to be considered separate or not, the judge did so treat them, taking scrupulous care repeatedly to instruct the jury that Lev could not be held responsible for acts occurring before the white hat contract. (See the Statement, *supra,* pp. 14–16.) The argument that the instructions were ambiguous and insufficient to protect Lev's rights (Pet. 435, pp. 20–21) is refuted by the record.

Despite the necessary length of the charge it was presented to the jury in a lucid and systematized fashion with individual attention given to each of the defendants. The law applicable to Lev as a participant only in the white hat conspiracy was stressed time and time again. (See the Statement, *supra,* pp. 14–16.) Contrary to the allegation of vacillation, the record shows consistent and punctilious efforts by the court to protect Lev. From the first point at which it appeared that evidence was being introduced with respect to transactions taking place before Lev's association with the group, the court pointed out that, in view of the nature of the conspiracy, he would upon occasion receive evidence subject to connection with a particular defendant (R. 100) and explained that, unless the government proved beyond a reasonable doubt that there was one conspiracy, cer-

tain evidence could not be considered against Lev (R. 115). He followed the practice of receiving evidence of the Bonita conspiracy only subject to connection, and he persistently reminded the jury, once at the insistence of Lev's counsel, that before any such evidence could be weighed against a defendant, the government would have to establish beyond a reasonable doubt by independent evidence that the defendant was a member of the conspiracy established (R. 402, 483, 539). He did indicate to counsel, out of the presence of the jury, his belief that the case might involve only one conspiracy, but said later that, for the benefit of Lev (R. 1537) and in the interest of "protection" and "conservatism", he had decided to charge on two conspiracies (R. 1844–1845, 1891–1892).

The cautionary explanations given at the time evidence was introduced, together with the final comprehensive instructions, adequately excluded the evidence of the Bonita conspiracy from consideration on the guilt of Lev.[3] Cf. *Blumenthal* v. *United States, supra,* 332 U. S. 539; *Paoli* v. *United States,* 352 U. S. 232.

2. There is no merit to petitioner Wool's assertion that there was insufficient evidence to connect him with conspiracy. We find no need to review here in detail the independent evidence against Wool, set out by the court below (Pet. 436, p. 33) and admitted in part by him (Pet. 436, pp. 21, 22). Taking the evidence as a whole, the jury had a right to conclude that

[3] Obviously the Court of Appeals examined the entire record in reaching the conclusion that Lev's rights had not been substantially affected. There is no merit to Lev's contention that the court below rejected his contention of variance *solely* on the basis that the two conspiracies could have been properly joined.

his close association with Rubin was not accidental and that he was not, in innocence, merely performing his duties as a United States contracting officer when he granted expensive contractual deviations to both Bonita and Lev, when he pressured another firm into subcontracting to Bonita, and when he approved Lev's bid to manufacture over seven million hats in spite of the fact that a pre-award survey showed that Lev had no machinery at all to manufacture the articles. Cf. *Paoli* v. *United States*, 352 U. S. at 236. This, coupled with the evidence of his acceptance of treatment from Rubin's doctor, paid for by Bonita, and the testimony of the man (Luciano) who denied being Wool's claimed source of enrichment during this period (see p. 13, fn. 2, *supra*), provided sufficient groundwork for the admission against him of statements made by co-conspirators. In totality, the evidence against him fully supports the verdict.

3. Carlin, an accountant for Bonita, testified as a government witness. In addition to identifying company records, he gave testimony principally concerning the initial meetings which culminated in the decision of the company officers to avail themselves of Rubin's services (R. 296–330). On cross-examination by Rubin's counsel, he testified that investigators of a Senate Committee had come to his office at a time he could not specify other than as about six months before the hearings in Washington. He said that he gave them a statement and believed that he had signed it. Counsel for Rubin then requested production of the statement. This was denied on the ground that no proper foundation had been laid (R. 342–343), a rul-

ing which antedated this Court's decision in *Jencks* v. *United States*, 353 U. S. 657.

Subsequently Carlin was asked about his testimony before the Senate Committee at open hearing, which had been recorded (R. 380–381), and was cross-examined with regard to specific statements made there (R. 380-387). Thereafter, out of the presence of the jury, counsel for Rubin again requested production of the statement allegedly made initially to investigators and the court denied the motion on the ground that there was not the slightest indication of inconsistency (R. 394–395).

On appeal, the United States Attorney, who did not have the statement in his possession at the time of the trial, filed with the Court of Appeals a sealed copy of the Senate investigator's summary of an interview with Carlin which had been obtained from the Committee,[4] and an affidavit to the effect that this was the only record of the interview and that it was not a substantially verbatim record (see No. 435, Pet. 37–38, 39–43). The Court of Appeals ruled that, while the trial court may have been in error in ruling that inconsistencies had to be shown before production was required, there was no occasion to reverse the convictions since, under 18 U. S. C. 3500, *supra*, pp. 2–4, the only record of the interview was not the kind of a statement whose production could be required at a new trial. This holding is challenged here by all three petitioners.

[4] The sealed copy of this summary has been forwarded to the Clerk of this Court by the Clerk of the Court of Appeals for the Second Circuit.

a. It should be noted at the outset that only Rubin moved for production of this document (R. 342) and no motion for the production of other documents now claimed to be relevant was made at the trial. The interest of the other petitioners in the subject matter of Carlin's testimony was so remote that it is understandable that they did not demand the report. Indeed, counsel for petitioner Lev elicited from Carlin on cross-examination the fact that he had nothing whatever to do with Lev (R. 331, 333). Moreover, the testimony of the witnesses recorded before the Senate Committee was available at trial and was used for impeachment purposes. Regardless of other considerations, error, if any, with respect to the statement was, in the light of the whole record, harmless. *United States* v. *Sheba Bracelets, Inc.*, 248 F. 2d 134 (C. A. 2), certiorari denied, 355 U. S. 904.

b. In any event, there was no error. While the trial court may have given the wrong reason for not requiring production, the ruling was correct both as of the time of trial and at present since there was, in fact, no statement of the witness which was available for impeachment purposes. Regardless of the subsequent legislation, which clearly covers the matter, we do not believe the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657, required the production of a statement which does not purport to be that of the witness, but which is merely another's interpretation of what the witness has said, subject to all the infirmities that may arise in recording recollection. And certainly the Court of Appeals, in determining whether to grant a new trial, was justified in taking

into consideration the fact that at a new trial production of the document could not be required. *United States* v. *Palermo*, 258 F. 2d 397 (C. A. 2) petition for writ of certiorari pending, No. 471, this term; *Scales* v. *United States* (C. A. 4), decided October 6, 1958,[5] petition for writ of certiorari pending, No. 488, this term.

c. Petitioners' suggestion that summaries of agents are not "immunized" by the statute, was rejected by the Second Circuit in *United States* v. *Palermo*, *supra*, upholding a denial by the trial court of a request for production of a written memorandum prepared by a Treasury agent embodying the results of a conference between the agent and a key government witness. The court said that it was apparent from the record that the memorandum was made from memory by the agent and was not intended to be a "substantially verbatim recital" of anything said by the witness; that it was merely a summary of the agent's recollection of what had transpired at the meeting; that it was not signed, approved or otherwise adopted by the witness; and that the purpose of the statute was to limit the right of inspection to statements and reports for which the witness, not an agent, is responsible.

The legislative history of the statute, a substantial part of which is concerned with the definition of the statements which are subject to production, fully sup-

[5] In that case, the Fourth Circuit held the statute to be the controlling law, pointing out that it did not matter whether its relevancy provision was regarded as an addition to, or change in, the *Jencks* procedure since this Court in *Jencks* was announcing only an evidentiary rule, not a constitutional one.

ports this position. As offered in the Senate on August 22, 1957, the bill defined the type of statements which would be subject to disclosure as those which are: "signed by the witness or otherwise adopted or approved by him, and any transcriptions or records of oral statements made by the witness to an agent of the Government, relating to the subject matter as to which the witness has testified."[6]

The Department of Justice expressed strong opposition to the use of the word "records" which had been substituted for the word "recordings" appearing in an earlier version.[7] It pointed out that the word "records" might be construed to include reports and files generally, including internal working papers which would reveal investigative techniques and identity of informants and complainants—that it would "authorize the very rummaging through government investigative files that the legislation is intended to prevent." (See letter dated August 22, 1957 from then Acting Attorney General Rogers to Senator Eastland, Chairman of the Senate Committee on the Judiciary, 103 Cong. Rec. 15791.)

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[6] The original version of the legislation, prepared by the Department of Justice and introduced as S. 2377, and as an amendment to H. R. 7915, defined the type of reports or statements which would be subject to disclosure as those which are: "Signed by the witness or otherwise adopted or approved by him as correct relating to the subject matter as to which he has testified."

[7] See the version reported on August 12, 1957 where statements were defined as those (103 Cong. Rec. 14457):

* * * "signed by the witness or otherwise adopted or approved by him, and any transcription or recordings of oral statements made by the witness to a Federal law officer, relating to the subject matter as to which the witness has testified.* * *"

Thereafter an attempt by Senator Dirksen to resubstitute the word "recordings" for "records" was defeated in the Senate after Senator O'Mahoney, sponsor of the legislation, argued that the requested change was of trivial importance since the word "records" was so limited in the context used (*i. e.*, "records of oral statements made by the witness to an agent of the Government") to afford protection against the fears expressed by the Acting Attorney General (103 Cong. Rec. 15930–15934).

The bill emerged from conference (the Senate and House being in disagreement) with the language of the present provision which defines the type of statements subject to disclosure as follows (103 Cong. Rec. 16487, 16738):

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other *recording,* or a transcription thereof, which is a *substantially verbatim recital* of an oral statement made by said witness to an agent of the Government and *recorded contemporaneously* with the making of such oral statement. [Emphasis added.]

This conference bill, its revised text meeting the approval of the Department of Justice (103 Cong. Rec. 16489), was agreed to by the Senate (103 Cong. Rec. 16489) and the House (103 Cong. Rec. 16742). Before its passage, Senator Javits, with the agreement of Senator O'Mahoney, observed on the Senate floor (103 Cong. Rec. 16488):

> As a practical matter, then, what has been done with the so-called records provision is to tie it down to those cases in which the agent actually purports to make a substantially verbatim recital of an oral statement that the witness has made to him—*not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him*, and as transcribed by him * * *. [Emphasis added.]

Representative Keating, pointing out that the conference bill fortified the position of the House members voting for a stronger bill, said, *inter alia* (103 Cong. Rec. 16739):

> * * * The conferees provided that the only statements a defendant could see, and when only in the courtroom were those actually signed or formally approved by the witness or a stenographic verbatim recital of a statement made by a witness which is recorded contemporaneously with the making of such oral statement. In other words, *only those statements need be produced in court by the Government which could be shown in court to impeach the credibility of the witness.* [Emphasis added.]

d. Petitioners allege that the Court of Appeals, in determining that the document in question was not a "substantially verbatim recital" of Carlin's statement within the meaning of subsection (e) (2) of 18 U. S. C. 3500, improperly conducted an *in camera* examination of it. There is no merit to this contention.

Admittedly the statute does not set up a procedure for resolving a conflict when the government claims

that a particular document is not a "statement" under subsection (e), nor did this Court in *Jencks* set forth the procedure to be followed when there is a dispute as to whether a statement is that of the witness. An acceptable course, however, is suggested by subsection (c) of the statute which provides a remedy for a defendant adjudged guilty who has been denied access to a part of a statement excised by the trial judge because of the government's claim that it was immaterial to the testimony. Under this procedure, on appeal, the entire text of the statement is sent to the appellate court "for the purpose of determining the correctness of the ruling of the trial judge". The Fourth Circuit has held that this provision affords due process and that its enactment is a reasonable exercise of Congressional power in protecting the right of the United States against disclosure of information which it is in the public interest to withhold so long as no pertinent information is withheld from the defendant. *Scales* v. *United States* (C. A. 4), No. 7637, decided October 6, 1958. See also *United States* v. *Gandia, et al.*, 255 F. 2d 454 (C. A. 2).

The same reason for permitting an *in camera* examination to determine relevancy would apply, we submit, where the claim is made, as here, that a document sought is not even the type of document which the statute requires to be produced. In the case of relevancy, the excision of a part of a statement is justified because it has no impeachment value. By the same token an entire document need not be turned over to the defendant when it is not the statement of the witness but that of an investigating agent. Nor have

petitioners been prejudiced by the failure of the trial court to examine the memorandum *in camera* since the appellate court has made the required determination *de novo*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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